Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-529

WES WISE, et al.,
Petitioners,

v.

ALBERT L. LIPSCOMB, et al.,
Respondents,

v.

ADELPHA B. CALLEJO, et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENORS IN OPPOSITION

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To The Honorable Judges of Said Court:

Intervenors in opposition oppose Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 9, 1977.

OPINIONS BELOW

The opinion of the district court is reported at 399 F.Supp. 782 (Pet. App. B, p. B-1 -B-2). The opinion of the court of appeals is reported at 551 F.2d 1043 (Pet. App. D, p. D-1—D-10).

JURISDICTION

The judgment of the court of appeals was entered May 9, 1977. (Pet. App. C, p. C-1). Rehearing by the court of appeals was denied on July 13, 1977. (Pet. App. E, p. E-1—E-2).

The mandate of the court of appeals was issued August 8, 1977. (Pet. App. C, p. C-1). The mandate of the court of appeals was recalled and the judgment of that court was stayed on August 30, 1977, by Mr. Justice Powell. (Pet. App. G, p. G-1). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the court of appeals properly held that the rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) was controlling and that absent unusual circumstances the district courts' apportionment plan required a preference for single member districts.

(2) Whether the court of appeals properly disregarded any finding of legitimate interest of the City in having a city-wide perspective in municipal government which would be furthered by use of multi-member districts.

STATUTORY PROVISIONS INVOLVED

Petitioner's references to the provisions of statutes, charters, ordinances and resolutions are correctly set forth.

STATEMENT OF THE CASE

Black and Mexican-American voters filed suit on March 10, 1971, in the United States District Court for the Northern District of Texas seeking a determination that the at-large election of all city council members unconstitutionally diluted their voting strength. At the time of the filing of this suit, all eleven council members were elected at-large from the entire city. *Lipscomb v. Wise*, 399 F.Supp. 782, 785 (N.D. Tex. 1975), Pet. App. B, P. B-4.

During the course of the pre-trial preparation, the class of Mexican-American voters were dismissed from the suit for failure of the individual class representatives to answer the interrogatories propounded by the City. On July 16, 1975, certain Mexican-American residents of the City of Dallas sought to intervene but the district court denied their motion.

On January 17, 1975, the district court held that the at-large election of all council members was unconstitutional and ordered the City to submit a remedial plan. *Lipscomb v. Wise, supra*, 339 F.Supp. at 792, Pet. App. B, p. B-16. In reply to this order the City submitted an "eight-three plan" which required the election of eight council members from single member districts and provided that the three

remaining members, one of whom to serve as mayor, be elected at-large. *Lipscomb v. Wise, supra*, 399 F.Supp. at 791, Pet. App. B., p. B-15.

Hearings were then resumed in district court to review the "eight-three" councilmanic election scheme enacted by the city council. The district court permitted the Mexican-American Intervenors to participate for the first time in this litigation for the limited purpose of "[determining] the constitutionality of the proposed plan by the City." (R. Vol. IX, p. 4).

In February, 1975, the district court ruled that the "eight-three" councilmanic scheme met constitutional standards and ordered the April, 1975, councilmanic elections to be held pursuant to this redistricting proposal. Shortly after these elections were held, Mexican-American Intervenors filed a Motion for Further Relief stating that the sole Mexican-American council member incumbent was soundly defeated for one of the at-large council posts. The Mexican-American Intervenors alleged that this defeat clearly demonstrated "that At-Large voting does not offer features which allow greater participation in the political process within Dallas for Mexican-American voters; but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningfully in the election process." *Lipscomb v. Wise*, 551 F.2d 1043, at 1048 (5th Cir. 1977), Pet. App. D. p. D8-D9.

The Court of Appeals for the Fifth Circuit reversed and remanded the decision of the district court and held that "the particular situation of Mexican-American citizens in Dallas did not constitute a special circumstance within the contemplation of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976)" which would justify the election of three of the eleven council members other than the mayor. *Lipscomb v. Wise*, 551 F.2d 1048, Pet. App. D. p. D-7.

All parties petitioned for rehearing and the court of appeals denied those petitiones on July 13, 1977. (Pet. App. E, p. E-1). The court of appeals denied petitioners' motion for stay of the mandate of that court. (Pet. App. F, p. F-1).

The mandate of the court of appeals was recalled and the judgment of that court stayed by order of Mr. Justice Powell on August 30, 1977. (Pet. App. G, p. G-1).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Properly Held That The Rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) Was Controlling and That Absent Unusual Circumstances, the District Court's Reapportionment Plan Should Have a Preference for Single Member Districts.

This Court has recently reaffirmed the rule that when district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single member districts are to be preferred absent unusual circumstances. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636,

at 639. In making this pronouncement, the *East Carroll* Court was not articulating a new test but refining a test first announced in *Conner v. Johnson*, 1971, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed. 2d 268, (per curiam), *Wallace v. House*, 538 F.2d 1138, 1144 (5th Cir. 1976).

The pronouncement of *East Carroll* is clear and a district court need not reject an all-at-large or mixed plan as unconstitutional in order to justify its choice of an all-single-member plan. A reviewing court need not reach the constitutionality of the mixed plan to decide whether the district court's choice was proper. *Wallace v. House, supra*, 538 F.2d at 1142.

In the instant case, the Court of Appeals for the Fifth Circuit did not have to determine the constitutionality of the mixed "eight-three plan" but acknowledged that the use of at-large voting to select three council members is not in itself constitutionally defective. *Lipscomb v. Wise*, 551 F.2d 1043, Pet. App. D, p. D-5. Concededly, the court of appeals did not purport to determine the constitutionality of the City's "eight-three plan", but held that the plan was contrary to federal common law and invalid because there was no special circumstances to justify the use of the three at-large positions within the contemplation of *East Carroll*. *Lipscomb v. Wise, supra*, 551 F.2d at 1048, Pet. App. D, p. D-9.

Because of the court of appeal's holding that the "eight-three plan" is in conflict with the special circumstance test of *East Carroll*, Petitioner contends that the court of appeals has incorrectly established a rule of conflict with this Court's prior decisions that a

state initiated plan, such as the "eight-three plan" must meet the "clear commands of the Equal Protection Clause" and not the special circumstance test of *East Carroll*. Furthermore, it is alleged that the decision of the court of appeals has eliminated the distinction drawn by this Court between court ordered and state-initiated reapportionment plans and their respective standards of review. *Chapman v. Meier*, 420 U.S. 1, 18 (1977). *Conner v. Finch, U.S.*, 97 S.Ct. 1828, 1833 (1977).

It has been determined that the all-at-large system of electing council members has unconstitutionally diluted the voting strength of Black Americans in Dallas. *Lipscomb v. Wise, supra*, 399 F. Supp. 782 (N.D. Tex. 1975), Pet. App. B; *Lipscomb v. Wise, supra*, 551 F. 2d at 1045, Pet. App. D, p. D-3. To correct the constitutionally defective all-at-large system, the Petitioner proposed a state-initiated "eight-three plan" which was adopted by the district court. *Lipscomb v. Wise, supra*, 551 F.2d at 1045, Pet. App. D, p. D-5. The district court in adopting this "eight-three plan" abused its discretion in not initially ordering a single-member plan as contemplated by *East Carroll*. *Lipscomb v. Wise, supra*, 551 F.2d at 1046, Pet. App. D, p. D-6.

The decision of the court of appeals evidences a literal following of *East Carroll*. The district court had the duty of "shaping remedial relief". In doing so, the district court erroneously adopted the state-initiated "eight-three plan" and should have initially, when confronted with the task of "shaping remedial relief", ordered a single-member reapportionment plan. The

court of appeals did not have the task of scrutinizing the apportionment plans under their different review standards since this is not a requirement of *East Carroll School Board v. Marshall, supra*, 424 U.S. at 639.

The court of appeals, however, did not stop its decision at this juncture but proceeded to consider the appropriateness of the state-initiated "eight-three plan". This court in *East Carroll* found it unnecessary to reach the constitutional merits of the proffered at-large plan but expected the district court to engage in this task. The district court in failing to consider the special circumstances in *Conner v. Johnson, supra*, 402 U.S. 690, abused its discretion in failing initially to order a single-member reapportionment plan. *East Carroll School Board v. Marshall, supra*, 424 U.S. at 639.

Similarly, in the instant case, the court of appeals finding that there was no special circumstance which called for other than a single-member plan, properly held that the district court abused its discretion in failing initially to order a single-member reapportionment plan.

The Petitioners, however, have sought to create a distinction between court ordered and court approved plans for purposes of determining if whether a single-member plan should be instituted once an at-large election system has been found to be unconstitutional. Such a distinction is artificial and would serve to encourage the adoption of makeshift at-large election systems which, as demonstrated in the case at bar,

would have the effect of excluding racial minorities from the electoral and political processes.

Such a distinction between court ordered and court approved plans was not recognized by the court of appeals. Instead, that court correctly followed clearly established precedent in this voting rights area by applying the rule reaffirmed in *East Carroll* and held that there was no special circumstances warranting the implementation of a districting plan other than a single-member plan.

2. The Court of Appeals Properly Disregarded the District Court's Finding That There Was A Legitimate Interest in Having a City-Wide Perspective in Municipal Government Which Would Be Furthered By Use of Multi-Member Districts.

Albeit, Mexican-Americans were found to have a significant interest in the subject matter of this litigation by the district court, *Lipscomb v. Wise, supra*, 399 F. *supp.* at 793, Pet. App. B, p. B-18, neither the district court nor the court of appeals held that their access to the political process had been unconstitutionally impaired. *Lipscomb v. Wise, supra*, 551 F. 2d at 1048, Pet. App. D, p. D-7.

Furthermore, the district court made various findings concerning the Mexican-American situation which would negate a conclusion that they create a special circumstance to justify at-large features of the "eight-three plan." *Lipscomb v. Wise*, 399 F. Supp. at 795, Pet. App. B, p. B-20. The district court found that Mexican-American citizens have suffered restrictions of access similar to Black Americans and

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that slating group operations have contributed to this restriction. 399 F. Supp. at 795, Pet. App. B. p. B-20.

Conceding that these findings were correct and properly made by the district court, it is inconceivable that any type of a mixed at-large plan could offer anything for Mexican-Americans, much less a city wide perspective in municipal government. Where Mexican-Americans have never been able to elect a Mexican-American candidate without the endorsement of a white slating group, *Lipscomb v. Wise*, 551 F.2d at 1045, Pet. App. D, p. D-3, there is no possibility of achieving a city wide perspective for Mexican-Americans for their perspective will be effected by the benefactors who endorsed them.

Knowing that at-large voting offered no features which would allow greater Mexican-American participation, the Mexican-American Intervenors did not endorse any mixed at-large plan nor did they submit one having any at-large features. *Lipscomb v. Wise*, 551 F. 2d at 1046, Pet. App. D, p. D-4. At-large features were of no benefit to Mexican-Americans and recognizing that a city-wide perspective under an "eight-three plan" was speculative if nonexistent, Mexican-American Intervenors opposed the adoption of the "eight-three plan". *Lipscomb v. Wise*, 551 F. 2d at 1051, Pet. App. D, p. D-9.

The Court of Appeals acknowledged this opposition and found enlightening the Motion for Further Relief filed by the Mexican-American Intervenors wherein the relative advantages of the "eight-three" system were disclaimed after the Mexican-American at-large

candidate was soundly defeated. *Lipscomb v. Wise*, 551 F. 2d at 1050, Pet. App. D, p. D-8. Clearly, a mixed at-large system which can systematically exclude Mexican-American representation in the city council cannot offer the additional feature of a city-wide perspective in municipal government for the Mexican-American.

CONCLUSION

For the foregoing reasons, Intervenors respectfully submit that the petition for writ of certiorari to the United States Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereb certify that a true and correct copy of the foregoing Brief for Intervenor in Opposition was mailed, via United States Mail, postage pre-paid, to Mr. Lee E. Holt and Mr. Joseph G. Werner, Attorneys for Petitioners; Mr. James A. Johnson, Mr. Edward B. Cloutman, III, Mr. Walter L. Irvin, Mr. Samuel Foutz, Attorneys for Respondents, on this the ..... day of November, 1977.

.....

George Solares